Supreme Court of the United States

No. .....

Term A. D. 1944.

F. G. BADENHAUSEN, WILLIAM S. SPATCHER and HOWARD H. HUBBARD, constituting the Protective Committee for the Holders of Georgia and Alabama Railway First Mortgage Consolidated Five Percent Gold Bonds,

Petitioners and Appellants Below,

AGAINST

OTIS A. GLAZEBROOK, JR., JOSEPH FRANCE and CHARLES MARKELL, as the Reorganization Committee of the Seaboard Air Line Railway Company, *et al.*,

Respondents and Appellees Below.

Brief in Support of Petition for Writ of Certiorari.

ABRAHAM MITNOVETZ,
Counsel for Petitioners.

Brief in Support of Petition for Writ of Certiorari.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 148 Fed. Rep. (2d) 450. The opinion is also printed in full in the Record (R. Vol. I, 637-641). No opinion was filed by the District Court for the Southern District of Florida. The District Court for the Southern District of Florida and the District Court for the Eastern District of Virginia heard the matter jointly. The opinion of the District Court for the Eastern District of Virginia is printed in full in the Record (R. Vol. I, 81-145) (53 F. Supp. 672).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. 347). A conflict exists between the Circuit Court of Appeals in this case and other Circuit Courts of Appeal on the same matter, which, in the interests of uniformity, this Court should finally and authoritatively settle (Supreme Court Rule 38[5][b]). The Circuit Court of Appeals has in this case decided important questions of Federal Law which have not been, but should be, settled by this Court. The decision is probably in conflict with applicable decisions of this Court (Supreme Court Rule 38 [5] [b]). A complete statement of the grounds on which the jurisdiction of this Court is invoked is contained in the petition filed herewith, *supra,* pages 18-24, petitioners respectfully request that said statement be deemed incorporated in the brief at this point.

Judgment was entered in this case by the United States Circuit Court of Appeals on April 10, 1945 (R. Vol. I. 637).

Statement of the Case.

The essential facts of the case are presented in the petition filed herewith (*supra*, pp. 1-16), which petitioners respectfully refer to and adopt as a part of this brief.

Specification of Errors.

(1) The Circuit Court of Appeals erred in approving and sanctioning the distribution by the Courts below of huge wartime earnings, accumulated in 1942 and 1943, and the redistribution of more than $22,000,000 in securities release through such wartime earnings, to only those mortgage divisions which showed segregated earnings during the period 1936 to 1940, particularly when many of the divisions, whose properties admittedly produced the wartime earnings accumulated during 1942 and 1943, failed to show segregated earnings during the pre-war period of 1936 to 1940. The Secondary Allocation, so approved by the Circuit Court of Appeals and the District Courts below, discriminated unfairly against the Georgia and Alabama Railway and other divisions whose properties admittedly produced the wartime earnings accumulated during 1942 and 1943 in favor of other classes of creditors.

(2) The Circuit Court of Appeals erred in affirming the Plan of Reorganization as fair and equitable, where the District Courts below failed to make any provision for the distribution of the excess current assets and working capital accumulated during the years 1942 and 1943 or for the subsequent wartime earnings which accrued (about $24,000,000 in 1944; approximately the same in

1945) to those secured creditors whose claims were not fully compensated in the Reorganization, but whose properties admittedly produced substantial portions of the huge wartime earnings realized.

(3) The Circuit Court of Appeals erred in approving the Plan of Reorganization adopted by the Courts below as fair and equitable, where the District Courts failed to exercise an independent judgment based upon the evidence, but accepted the Plan as a compromise agreement to which most of the interested parties had consented in order to expedite the Reorganization.

POINT I.

A conflict exists between several Circuit Courts of Appeal as to the proper distribution in a railroad reorganization of excess funds and surplus securities released by recent huge wartime earnings, which must be resolved by this Court.

It is a matter of judicial and common knowledge that every railroad in reorganization or otherwise has benefited tremendously in increased traffic and earnings during the present wartime crisis. Since the Interstate Commerce Commission must approve in all cases, both bankruptcy and receivership, the new capitalization of the reorganized railroad, the Commission and the Courts in all cases have insisted upon a conservative recapitalization—one which will prevent the recurrence of any future bankruptcy or insolvency. The resulting effect has been that practically all railroads now in the process of reorganization have been carrying current assets and working capital, consisting of cash and current securities, far in excess of what is needed for the efficient operation of the road. These earnings have made it possible for all railroads to reduce their

fixed debt substantially, and, in the case of reorganized railroads, to purchase their outstanding secured issues and obligations, which usually carry high interest charges, at market prices generally far below their par value. In the case of railroads in reorganization, the securities so purchased or acquired by the receivers or trustees no longer require the new securities originally allotted to them in the recapitalized plan of reorganization, and these surplus securities must be redistributed among the remaining creditors.

This Court has never decided the question of what constitutes a fair and equitable distribution of *realized* wartime earnings or a fair redistribution of surplus securities provided for in an existing plan of reorganization and subsequently released by wartime earnings, through cash provisions made in the railroad reorganization. Nor has this Court decided whether it is fair and equitable to secured creditors, whose claims have not been fully paid or compensated in a plan of reorganization, to permit excess current assets and surplus working capital (obtained from wartime earnings and reasonably expected to continue to accrue during the war period) to be carried forward in a reorganization and to inure to the benefit solely of those creditors whose claims have already been fully compensated in the plan of reorganization. The question as to whether wartime earnings (or securities released by purchases from wartime earnings) in a railroad reorganization should be distributed either on a relative *value* basis or on an *actual earnings basis* among all the mortgage divisions during those years when they were acquired, *or* whether the funds and securities so acquired should be distributed among the various divisions on a *pre-war earnings basis* (such as 1936-1940) and in different pre-war ratios, contrary to the actual facts, has never been adjudicated by this Court so far as our research indicates. These questions are paramount and vital issues in every existing

railroad reorganization in the United States and should be settled by this Court.

Moreover, a conflict exists between several Circuit Courts of Appeal on these questions involving the same matter.

Petitioners do not ask that current war earnings be taken as a measure of future earnings (which would in itself justify a larger authorized capitalization), but that proper recognition and distribution be given to earnings already *realized.*

As indicated in the instant case, huge amounts of cash have been rapidly accumulated by the Seaboard System from current earnings during the years 1942 ($34,000,000) and 1943 ($24,000,000). Much of this surplus cash was applied to the payment of senior claims and other secured obligations of the System, which materially reduced the claims which were originally admitted to participation in the new corporation and released equivalent amounts of surplus securities for redistribution among the various mortgage divisions. The securities so released for reallocation in 1943 alone were in excess of $34,000,000. In addition, there remained many millions of dollars of excess current assets and working capital in the hands of the Receivers. Thereafter, in 1944, the Seaboard System acquired in net earnings an additional $24,000,000, and it is estimated that in 1945 its net earnings will approximate that of 1944. This condition has been true to a great extent in practically every railroad reorganization now pending.

No unifomity exists as to the method of distributing these surplus securities and funds. The method differs in several judicial circuits. In the *Milwaukee* case (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*), 318 U. S. 561, 563, this Court held that in principle the various creditors of the insolvent corporation should receive in the new securities to be issued by

the new corporation the *equitable equivalent position* each formerly possessed. Unless the surplus securities and excessive funds obtained by the wartime earnings are fairly and equitably distributed, the remaining classes of secured creditors, who have not been fully compensated for their claims and who have contributed to these surplus funds and the release of these surplus securities, cannot receive in new securities the equitable equivalent position each formerly possessed.

In the instant case, under the Secondary Allocation adopted by the District Courts and sanctioned by the Circuit Court of Appeals, the bulk of these excess securities and surplus funds had been distributed to *only* mortgage divisions which showed earnings during the period 1936 to 1940, when the earnings were at a far lower level than the period during which the wartime earnings were accumulated. Many of the mortgage divisions (including the Georgia and Alabama Railway) showed no net earnings during the period 1936 to 1940 and were designated "deficit lines", whereas during the years when the wartime earnings were accumulated the Georgia and Alabama Railway and other so-called "deficit lines" admittedly became substantial earning divisions, which produced much of the cash or excess securities now being distributed. The record indicates without controversy that the Georgia and Alabama Railway earned in 1942 over $1,016,000 (R. Vol. I, 411), and in 1943 it was estimated that the Georgia and Alabama Division earned at least $1,500,000 (R. Vol. I, 370-371). Nevertheless, the Georgia and Alabama Division fails to share or participate in this distribution.

Since the holders of securities whose properties have produced such earnings do not participate in the distribution of the earnings (or surplus securities released by these earnings), they do not receive the equitable equivalent position they formerly possessed in accordance with the principles expressed by this Court in the "Milwaukee"

case, *supra*, and the method of distribution adopted in these proceedings by the Courts below is in conflict with applicable decisions of this Court.

There is no legal precedent or logical reason for this principle or method of distribution.

It is in conflict with similar distributions, such as that affirmed by the Circuit Court of Appeals for the Second Circuit in the case of *In re New York, New Haven & Hartford R. Co.*, 147 Fed. (2d) 40 (hereinafter referred to as the "New Haven case"). In the "New Haven case", the Interstate Commerce Commission, in its plan, proposed that the securities originally allotted, but released by payments under order of the Court out of current earnings of the System, be redistributed among the remaining secured creditors not already awarded the full value of their claims ratably in proportion to the *amount* of their claims. Objection was made to the basis of this distribution. The District Court sustained this objection, 54 F. Supp. 607, 608, on the ground that a creditor whose sesecurity is the same in quantity and quality as that of his neighbor is not entitled to a more generous allotment of bonds because his claim is greater. The District Court decided that the redistribution of surplus securities be established by mathematical computations based solely upon the findings of the *values* of the several issues already made by the Commission and which constituted the foundation of the plan under consideration. The District Court stated, 54 F. Supp. 608:

> "The distribution can also be shaped to preserve the same relationships in treatment between the bond issues affected as have already been approved by the Commission without resort to equations of equivalence not supported by the Commission's findings or to *methods* which I have found *not in conformity with legal standards.* These relationships

> can be established by mathematical computations based solely upon findings of the *values* of the several issues already made by the Commission and which indeed constitute the foundation of the very plan now under consideration." (Emphasis supplied).

The correction made by the District Court of the redistribution of excess securities was subsequently approved and modified by the Commission in its fifth supplemental report. The Circuit Court of Appeals for the Second Circuit, in approving of this correction and distribution, stated, 147 F. (2nd) 44:

> "We regard it as a commendable instance of properly coordinated action between the Court and the Commission, the importance of which was noted in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 475."

On the other hand, the Tertiary Allocation recommended by the Compromise Committee in the instant case and approved by the Courts below, which distributed a small portion (less than $12,000,000) of the surplus securities and cash released by the wartime earnings, recognized the true principle of distribution adopted by the Second Circuit Court in the "New Haven case".

The Compromise Committee, in its Report, stated:

> "It may well be noted that as to the *fundamental principle of fairness and equity* in approving for distribution the abnormal war earnings to holders of securities *whose properties have produced such earnings*, generally *similar proposals*, different in method and form, have been made and have been or *are* being dealt with in railroad reorganization pro-

ceedings *pending* before the Interstate Commerce Commission and the Federal courts" (Vol. I, p. 419). (Emphasis supplied.)

The Compromise Committee stated that it gave effect to this principle by the use of the Tertiary Allocation. The Tertiary Allocation redistributed the small amount of released securities to which it applied among *all* the secured issues by mathematical computations based solely upon the findings of the *values of the several issues* indicated by the Plan's two previous Allocations. This was done by the medium of distributing the released securities as if they were declared dividends which would have been paid on the securities allocated to the respective issues if the Plan had gone into effect on January 1, 1942.

The Tertiary Allocation in substance adopts and follows the principle adopted in the "New Haven case", which was approved by the Second Circuit Court of Appeals (147 Fed. [2d] 40, 44). Conversely, the Secondary Allocation approved in the instant case by the Circuit Court of Appeals was contrary to the principles approved by the Second Circuit Court, and discriminated unfairly and failed to give due recognition to the rights of the Georgia and Alabama bondholders, in favor of other classes of creditors who, alone, showed segregated earnings during 1936 to 1940.

Petitioners likewise contend that the decision which they seek this Court to review is also in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of the *Denver and Rio Grande Western Railroad Company, et al.* v. *Insurance Group Committee, et al.*,* .... Fed. (2d) .... In the "Denver and Rio Grande" reorganization, the Circuit Court of Appeals reversed the order of the District Court approving the plan of reorganization, because the plan failed to

*Not as yet officially reported.

make equitable distribution of the excess cash and surplus current assets on hand, failed to equitably distribute surplus securities released by subsequent cash payments, and failed to make equitable provisions for the distribution, to the creditors whose claims had not as yet been paid in full, of the excess war profits which may reasonably be expected to accrue during the war period. The Circuit Court stated:

> "The mere fact, however, that cash and current assets are not required to be reflected in the capital structure in the form of capitalized value does not remove them from the picture. They are nevertheless assets of the corporation which must be taken into account in drawing up a fair and equitable plan of reorganization, and must be distributed in a manner that is fair and equitable to all classes of creditors. * * * Adequate operating funds are essential to the operation of a railroad. The Senior Bondholders were entitled to receive in addition to the full amount of their claims, working capital sufficient for proper and efficient operation of the railroad. But anything in *excess* of what was reasonably necessary for this purpose constituted assets of the insolvent corporation which belonged to the remaining creditors."
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> "* * * While these increased net earnings are due in large part to the war and will not continue after the end of the war, and may therefore be disregarded in setting up the capitalized structure based upon prospective earnings, we cannot disregard the fact that these *huge surpluses actually exist.* Their existence is an accomplished fact. It is also obvious that surpluses will continue to pile up for a reasonable time yet to come. We think any plan which fails to take this into account and which

gives the Senior Bondholders their claims in full by substantially delivering the road to them, and gives them the surplus cash actually on hand and further enables them to receive in addition the excess war profits which are reasonably sure to come, is inherently inequitable and unfair, so long as there are classes of creditors whose claims are not fully satisfied." • • •

"The inherent weakness in the plan was not only that it did not make equitable distribution of the excess current assets on hand, but also that it failed to provide for the equitable distribution of excess war profits which could reasonably be expected to accrue during the rest of the war period." (Emphasis supplied.)

In the *Florida East Coast* case, the Commission's plan (effective date December 1, 1940) fixed the new capitalization of the reorganized company at $37,000,000. By the time the Commission's plan came before the Court for consideration, the available net income had jumped from less than one million to over 9 million dollars a year. The cash on hand had climbed from about 1¼ millions to over 17¾ millions.

The Court found that this great accumulation of cash not only made it necessary to give the old junior bonds more and better new securities, but required many other major changes. On motion, the Court sent the plan back to the Commission.

Judge Strum in the *"Florida"* case said in part, 52 F. Supp. 422-423:

"This sum of $17,795,365 on hand October 1, 1943, is an existing fact, not a prophecy. • • •

• • • • • •

"This cash represents net earnings of the company, on which the bondholders have a lien. To the extent that it is prudently available, the bondholders are entitled to the benefit of this surplus cash, either by having it applied in an equitable manner in satisfaction of their claims, or by having it otherwise definitely allocated by the Commission as a component part of the reorganization plan, so that it may be equitably applied to the best advantage of all concerned. * * * *To approve the present plan, ignoring the existence of this fund, would be improvident and inequitable to all security holders, especially to the minority. Such a course would not afford due recognition to the rights of the present bondholders, who have liens on these funds.*" (Emphasis supplied.)

It will be noted that in the instant case the excess current assets and surplus working capital are carried forward in the Reorganization and inure to the benefit of those creditors whose claims have already been fully compensated in the Plan of Reorganization.

It will be further noted that if no other disposition is made of the surplus securities released by subsequent cash provisions in the Plan of Reorganization and they remain undistributed, the value behind them will *inure* to the further benefit of the remaining creditors whose claims have already been *fully compensated* in the Plan. In effect, therefore, payment upon payment is being made to those secured creditors who have already been fully compensated for their claims. These mortgage divisions receive far more than the total amount of their principal and accrued interest, and, in fact receive a *bonus*, whereas many of the mortgage divisions which are first liens of equal rank have still not been paid their claims in full.

Such principles or methods of distribution are clearly unfair and inequitable and discriminate against the Georgia and Alabama Division and other first mortgage lines whose claims have not been paid in full. They are probably in conflict with applicable decisions of this Court as indicated in the "Milwaukee case", *supra*.

A conflict unquestionably exists between various Circuit Courts of Appeal, not only with respect to the equitable distribution of excess current assets on hand or surplus securities released by the wartime earnings, but also with respect to the equitable distribution of excess profits which can reasonably be expected to accrue during the rest of the war period. An anomalous situation has arisen whereby a creditor in one judicial circuit, whose security is the same in quality and quantity as that of his neighbor, may receive a far more generous allotment of securities than his neighbor if his claim happens to arise in another judicial circuit where the method of distribution is entirely different. The consequences have been and are so disastrous to railroad investors, and so dangerous to the credit of the railroads in general, that they should be corrected and finally settled by this Court. The public interest in the uniform administration of justice further demands that this conflict be resolved.

POINT II.

A Plan of Reorganization could not be approved as fair and equitable where the District Courts in approving the Plan did not exercise an independent judgment, but accepted a compromise agreement recommended by some of the interested parties.

Petitioners contend that the Circuit Court of Appeals' decision in the instant case further conflicts with the decision of the Circuit Court of Appeals for the Second Cir-

cuit in the "New Haven case", 147 Fed. Rep. (2d) 40, in that the approval of the Plan of Reorganization by the District Courts in these proceedings was predicated substantially upon a compromise agreement assented to by a majority of the principal secured creditors.

In the "New Haven case", a bankruptcy case as distinguished from the instant case, the Circuit Court held that the Interstate Commerce Commission must approve a plan for the reorganization of a railroad in the *exercise of an independent judgment,* uninfluenced by the fact that the principal interested parties have agreed on its terms. The "New Haven" plan provided for the purchase of a leased line ("Old Colony"). The Interstate Commerce Commission was required to approve and fix a purchase price for the assets of this leased line. The Circuit Court of Appeals held that the record clearly indicated that the purchase price fixed by the Interstate Commerce Commission for the assets of this leased line was predicated substantially upon a compromise agreement made by some of the principal interested parties. The Second Circuit Court of Appeals, in holding that the Interstate Commerce Commission must approve a plan of reorganization of a railroad in the exercise of an independent judgment, uninfluenced by the fact that interested parties have agreed on its terms, stated:

(p. 49)

> "Section 77 requires an independent determination by the Commission that the plan is 'fair and equitable'. The heart of such a determination is a finding of fact by the Commission as to the value of the debtor's property. It follows that that finding cannot be based upon the consent of some of the interested parties but must be a conclusion independently reached by the Commission upon a consideration of the evidence. One of the purposes of

section 77 was to do away with an evil prevalent in reorganization through equity receivership proceedings, namely, the customary practice of submitting to the court a plan already consented to by a large proportion of the old security holders and thus exerting pressure on the court to approve it against objections of minorities, because failure to do so would mean the upsetting of a *fait accompli* and the undoing of an immense amount of effort and negotiation. See *New England Coal & Coke Co.* v. *Rutland R. Co.*, 2 Cir., 143 F. 2nd 179, 188; Fuller, The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations—A survey, 7 Law and Contemporary Problems (1940) 377, 384; S. E. C. Report on Protective and Reorganization Committees, Part VIII, 152."

* * * * *

(p. 50)

"We cannot read this otherwise than as meaning that the Commission accepted the compromise of the joint report for fear that any material modification of it, which the Commission might have independently approved as fair and equitable, would be unacceptable to the parties and would result in delay in consummation of a reorganization. That is to say, the Commission was influenced by the pressure of the compromise agreement and by the fear that a large block of security holders of New Haven would not consent to a plan materially different."

The Record in these proceedings clearly indicates that the issues before the District Courts were decided not on a legal or judicial basis but on a *compromise basis*, due to the mistaken belief of the District Courts that it was the duty of the Courts to approve the Plan since a very large

majority of the secured creditors had assented to it and the reorganization would consequently be expedited. The District Courts repeatedly stated that the manner in which the issues involved could be adjusted was more a matter of good business judgment than of legal principle. The opinion filed by the "Virginia District Court", confirmed and concurred in by the "Florida District Court", substantiates this fact. In approving the Plan as fair and equitable, the "Virginia Court" opinion stated:

> "The major questions arising on the exceptions to the master's report were the conflicting contentions between the underlying bonds as represented by the general counsel for the Committee for those bonds and counsel for the general mortgage bonds. The report of the Conference Committee shows that these conflicting contentions have now been harmonized *if the plan can now be consummated without substantial modification.* * * * Secondly, the other important feature of the plan is *not primarily a matter of public interest but of private business interests of the secured creditors.* * * * *Of those who have participated the very great majority have approved the plan as modified*" (R. Vol. I, 133-134).
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> "The problems involved in the plan for allocation of the new securities are intricate in detail. They are, however, to a *very large extent problems of business interests* rather than controlled by definite rules of law. * * * It is utterly improbable that any plan could be devised which would give entire satisfaction to all of the numerous and diverse creditors' interests here involved. * * * It is of the utmost business urgency in the interests of all the bondholders of all classes that the reorganization

should be speedily consummated at the present time of favorable earnings" (R. Vol. I, 136-137).

* * * * *

"At present the most obvious single fact is the great importance of *speedily accomplishing the reorganization* consistent with due regard for equitable and fair treatment of the diverse interests. The principal objection to now proceeding under section 77 is the anticipated further protracted delay that would seem to be probably incident to an entirely new proceeding before the Commission. * * * *Whether the same result would obtain now, in view of the very substantial agreement* as to the plan of reorganization by the *major conflicting interests,* and the clarification of the whole subject by the recent decisions of the Supreme Court, makes the prediction as to the extent of the delay more uncertain. * * * The division of the new securities is *primarily a matter for the parties themselves.* There is some reasonable basis for the hopeful thought of the parties that equity reorganization can be consummated within a comparatively short time. * * * As a matter of personal preference the court would prefer to have the procedure in bankruptcy rather than in equity, but as the *allocation of the new securities is a matter primarily of individual rather than public interest,* the court is hesitant to deny to the interested parties a reasonable opportunity to consummate the reorganization, as they think will be possible, much more speedily than they anticipate would be possible through bankruptcy" (R. Vol. I, 140-141).

* * * * *

"A period of a few months should be sufficient to test out the question whether sufficient now out-

> standing bonds will voluntarily participate in the plan. If they do not, the necessary alternative will be bankruptcy procedure. If resort must be had to that, with the result that some substantially different plan is formulated, there is *no present certainty that the present large majority approval would be secured for a substituted plan.* If not, indefinite further long delay is inevitable. As has been said, the major and dominant consideration seemingly in the interests of all is to promptly consummate the plan while the scale of railroad earnings is so fortunate." (R. Vol. I, 142). (Emphasis supplied.)

The District Courts' hearings on the exceptions to the Special Master's Report and Plan of Reorganization were held between October 25, 1943 and November 5, 1943. The District Courts' hearings on the modifications recommended by the Compromise Committee were held between November 29, 1943 and December 1, 1943. At the close of the hearings on the exceptions to the Special Master's Plan, on November 5, 1943, the Court rendered its tentative views on the issues involved in these proceedings. In discussing the unfairness of the results of the Special Master's Plan with respect to the Georgia and Alabama Railway, the Virginia Court stated:

> "Furthermore, I think that a great deal of influence ought to be given to the recent earnings which are now causing emphasis on the contest that we have. Just how those recent earnings ought to be influential in what is the final allocation of securities is largely a business question. I think we were told during the hearings that the *Georgia & Alabama had made net earnings of something over a million dollars in the last year or two* and that they are awarded securities on the basis here in the plan

which would not amount to much more than that; furthermore, that the *scrap value* of the Georgia & Alabama is pretty nearly as much as the market value of the securities that are awarded to it. Those things *cry out for adjustment* and just how they can be adjusted is much more a matter of good business judgment than it is merely of legal principles" (R. Vol. I, 360). (Emphasis supplied.)

The only modification recommended by the Compromise Committee at the subsequent Court hearing, November 29th to December 1st, which benefited the Georgia and Alabama Division in any respect was the Tertiary Allocation. As previously stated, the Tertiary Allocation distributed only a small portion (less than $12,000,000) of the excess securities released by the wartime earnings in 1942 and 1943. The treatment given to the Georgia and Alabama Division under the Tertiary Allocation was *relatively poorer* than that made to most of the other divisions, because the Tertiary Allocation was predicated upon the two previous Allocations, to wit, the Primary and Secondary Allocations, and the Georgia and Alabama Division received no securities under the Secondary Allocation (which distributed the bulk of the excess securities released from wartime earnings), since it showed no segregated earnings during the period 1936 to 1940.

The foregoing excerpts from the Primary District Court's opinion and the Record clearly indicate that the District Courts approved the Plan for two basic reasons: (1) The principal interested parties had agreed upon the Plan's terms and there was no certainty that the present large majority approval would be secured for a substituted Plan if there were any material modifications; and (2) The Plan of Reorganization would be expedited during the present period of favorable earnings.

As stated by the Circuit Court of Appeals for the Second Circuit "That it was improper for the equity court to

yield to such pressure was clearly shown in *First Nat. Bank* v. *Flershem*, 290 U. S. 504, at page 525, 54 S. Ct. 298, at page 306, 78 L. Ed. 465, 90 A. L. R. 391 by the statement: 'The failure to secure an adequate price seems to have been due, not to lack of opposing evidence, but to the mistaken belief that it was the duty of the court to aid in effectuating the plan of reorganization, since a very large majority of the debenture holders had assented to it.' See also *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436."

CONCLUSION.

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM MITNOVETZ,
Counsel for Petitioners.

July 3rd, 1945.